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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

Jeremy Brown, Charging Party, and National Association of Broadcast Employees and Technicians - The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, AFL-CIO, Local 51 ("NABET-CWA Local 51" or "Respondent"), Respondent.	Case Nos. 19-CB-244528 19-CB-247119 **ANSWER TO GENERAL COUNSEL AND CHARGING PARTY'S EXCEPTIONS TO ALJ DECISION**

Counsel for the Respondent did not shirk (dodge, run from, avoid, shun etc.) from their responsibility to represent their client. As a result, one of them sent an evidence preservation letter to counsel for the charging party. In fact it was sent twice. The Administrative Law Judge has correctly analyzed it as a reasonable response to threatened litigation. We note that any interference with this letter would be a violation of the First Amendment Right to Petition as well Right of Speech, as well as section 8(c) of the Act. See also 29 U.S.C. section 160 (Board to apply Federal Rules of Evidence to the extent practical).

Nothing remotely similar to restraint or coercion against participating in the Board's process happened here. Respondent's counsel simply sent Charging Party's counsel letters demanding the preservation of evidence, as part of the legal defense against the charges. It is important to emphasize that the letter was sent to his lawyer, who could decipher or explain the purpose, assuming he is competent. The charge and Complaint are not directed at any particular language in the letters; rather, they attack the sending of the letters. In other words, the charge improperly seeks unfair labor practice liability to be imposed upon the Union for exercising its right to notify Charging Party and his counsel to preserve relevant evidence.

Evidence preservation letters, sometimes called litigation hold letters, are commonplace in court litigation, either during or in anticipation of litigation. See, e.g., The Rutter Group Practice Guide: Federal Civil Procedure Before Trial National Edition, Chapter 11(I)-C, ¶ 11:126.2, citing *In re Ethicon, Inc.*, 299 F.R.D. 502, 512 (SDWV 2014) (collecting cases) "courts agree that the receipt of a demand letter … will … trigger the duty to preserve evidence." In the context of court litigation, it is common practice for one party to send another an evidence preservation letter, without prompting additional litigation about whether the letter itself is allegedly wrongful. See also Chapter 10 of "Electronic Discovery and Records and Information Management Guide," by Grenig, Stippich and Twigger (2020) (Thomson Reuters)[1]

Likewise, there is no reason to believe an evidence preservation letter violates another party's rights in the context of unfair labor practice proceedings. The underlying duty to preserve evidence also exists in this forum, so Respondent's counsel could reasonably expect Charging Party's counsel to explain the duty to his client. The ALJ Benchbook expressly recognizes the duty to preserve discoverable information at section 8-730. The Benchbook explains,

> The duty requires that the party take reasonable and proportionate steps to preserve relevant and discoverable information within its

[1] Board proceedings are governed generally the Federal Rules of Evidence under the Rules of Civil Procedure. 29 U.S.C. § 160(b),

> possession and control. Depending on the scope of such information and other circumstances, this may include implementing a "litigation" or "legal" hold to ensure that the organization's key custodians or data stewards take steps to preserve such information and to prevent losses due to routine business or system operations. The failure to take reasonable and proportionate steps may warrant curative measures or evidentiary sanctions, including adverse inferences, depending on whether the party acted in good faith or with the intent to deprive the other party of the information in litigation. See FRCP 37(e) (Failure to Preserve Electronically Stored Information); Ashworth et al., 10A Fed. Proc., L.Ed. § 26:553 (Sept. 2019 Update) (Duty to preserve evidence for production and inspection); and *The Sedona Conference Commentary on Legal Holds, Second Ed.: The Trigger & The Process*, 20 Sedona Conf. J. 341 (2019) (summarizing the above principles and offering guidelines).
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> …
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> For a Board case addressing the duty to preserve evidence for an unfair labor practice proceeding, see *Queen of the Valley Medical Center*, 368 NLRB No. 116, slip op. at 41-44 (2019)…See also *McDonald's USA, LLC*, 364 NLRB No. 144, slip op. at 2 n. 5 (2016)…and *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 636 (2007)…

Similarly, the ALJ Benchbook recognizes at section 8-720 that adverse inferences may be drawn due to a party's failure to produce documents responsive to a subpoena.

Consistent with the duty to preserve evidence recognized in the ALJ Benchbook, the evidence preservation letters in this case simply were designed to ensure that steps were taken to preserve potentially relevant records, especially electronically-stored information which is often lost due to automatic deletion of older information, electronic mailbox maintenance, changes of service accounts and the like.

Moreover, the evidence preservation letters constitute protected activities themselves, as well as exercises of the First Amendment right of petition and participation in litigation. The Union's counsel was acting in defense against the unfair labor practice charge, in placing Charging Party and his counsel on notice to preserve evidence. We note the First Amendment problem if an individual person could send the evidence preservation letter but a labor organization could not. This is content discrimination, viewpoint discrimination, and identity-based discrimination, which are prohibited under the First Amendment. The restriction could not

pass strict scrutiny. *Barr v. American Association of Political Consultants*, 140 S.Ct. 2335 (2020); *Iancu v. Brunetti*, 139 S.Ct. 2294 (2019); *Janus v. Am. Fed'n of State, County & Municipal Emps.*, 138 S.Ct. 2448 (2018).

We cannot do better than to quote the dissent recently written by Judge Berzon in explaining why the First Amendment protects Union speech:

> Why, then, has this Court denied to the union the First Amendment protection that it would surely have extended to our imagined vegetarian? One could be forgiven for answering: Because unions seem to operate under a different First Amendment than the one that protects the rest of us.
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> Much has been written about the apparently anomalous First Amendment status of unions. *See, e.g.*, Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 Mich. L. Rev. 169, 193–211 (2015); Catherine L. Fisk, *Is It Time for a New Free Speech Fight? Thoughts on Whether the First Amendment is a Friend or Foe of Labor*, 39 Berkeley J. Emp. & Lab. L. 253, 258–67 (2018); *see also* Case Comment, *NLRB v. International Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229*, 133 Harv. L. Rev. 2619, 2620–26 (2020). But the scholarly engagement with that anomaly, as well as the development of labor doctrine in our courts, has always focused on the reasons *why*, and the particular contexts *where*, labor speech receives less constitutional protection than non-labor speech would. The panel opinion, by contrast, elides these difficult labor law questions and the rich history from which they spring. Instead, it treats this difficult case as squarely settled by a single 1951 Supreme Court precedent, *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694, 71 S.Ct. 954, 95 L.Ed. 1299 (1951) ("*IBEW*"), which it treats as having held that even the "pure speech" here at issue may be enjoined without offending the First Amendment, because the words "induce or encourage" as used in Section 8(b)(4)(i)(B) are "broad enough to include in them every form of influence and persuasion." *Local 229*, 941 F.3d at 905–06 (quoting *IBEW*, 341 U.S. at 701–02, 71 S.Ct. 954).
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> As I shall show, *IBEW* does not compel, or even support, the result reached in the panel's decision. The only unlawful conduct at issue in *IBEW* consisted in the union's *picketing* activity directed at neutral employees, considered together with a subsequent phone call emphasizing the purpose of the picketing. *Id.* at 705, 71 S.Ct. 954. Those facts are critically different from those in this case, where the speech enjoined was not picketing. That difference is made all the more critical by the transformative developments in First Amendment doctrine that unfolded in the decades that followed *IBEW*, and, in particular, by the picketing-based theory that the Supreme Court adopted as its rationale for differential treatment of labor speech in the First Amendment context.

When contemporary doctrine is applied, there can be little doubt that the pure speech here enjoined is entitled to full First Amendment protection. By declining to undertake any identity-, content-, or viewpoint-based analysis—including the strict scrutiny inquiry those features should have triggered—and instead relying on an inapposite, seventy-year-old Supreme Court opinion, the panel here has needlessly relegated to second-class constitutional status the right of labor organizations to speak peacefully and noncoercively on matters that may concern them greatly…

A few examples of the doctrinal developments that unfolded after *IBEW* was decided demonstrate the significance of this transformation. Take content discrimination: In *Boos v. Barry*, the District of Columbia had prohibited, within 500 feet of a foreign embassy, any sign tending to bring that foreign government into "public odium" or "disrepute." 485 U.S. 312, 315, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). The Supreme Court determined that the restriction was content-based because it proscribed "an entire category of speech—signs or displays critical of foreign governments." *Id.* at 319–21, 108 S.Ct. 1157. Because the restriction was content-based, the Court applied strict scrutiny and concluded that, even assuming that the law furthered a compelling interest in protecting the "dignity" of foreign diplomats, it was not narrowly tailored to serve that interest in view of the less restrictive protections for embassies that prevailed across the rest of the country. *Id.* at 321–27, 108 S.Ct. 1157. And although some language in the *Boos* Court's opinion suggests that the need to apply strict scrutiny depended upon the political nature of the speech prohibited and the public nature of the forum to which the prohibition applied, *id.* at 321, 108 S.Ct. 1157, the Supreme Court has more recently backed away from any such limitations, repeatedly declaring that "content-based regulations of speech are subject to strict scrutiny" without regard to whether the speech is political or the forum public. *Nat'l Inst. of Family & Life Advocates v. Becerra*, —— U.S. ——, 138 S. Ct. 2361, 2371, 201 L.Ed.2d 835 (2018); *see also, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015).

Or consider viewpoint discrimination: In *R.A.V. v. City of St. Paul*, a municipal ordinance made it a misdemeanor to place on public or private property any "symbol, object, appellation, characterization or graffiti ... which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. 377, 380, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). A state high court had interpreted the phrase "arouses anger, alarm or resentment in others" to limit the reach of the ordinance to "fighting words," which are generally denied First Amendment protection on account of the conduct element that they involve. *Id.* at 381, 112 S.Ct. 2538. The Supreme Court determined that, even as applied to "fighting words," the ordinance went "beyond mere content discrimination[ ] to actual viewpoint discrimination" in that only fighting words which aroused "anger, alarm and resentment" in others were prohibited, while fighting words used "*in favor* of racial, color, etc., tolerance

> and equality" remained permissible. *Id.* at 391–92, 112 S.Ct. 2538 (emphasis in original). Recognizing that viewpoint discrimination is even more offensive to First Amendment values than is content discrimination, the Court struck down the ordinance, declining to apply even the strict scrutiny standard that "mere content discrimination" would demand. *Id.* at 391–93, 112 S.Ct. 2538. Thus, as to speech that involves a conduct element, as picketing does, the application of the unforgiving viewpoint discrimination doctrine is required by *R.A.V.* Where, as here, only "pure speech" is implicated, the doctrine's application should be even more uncontroversial. *Local 229*, 941 F.3d at 904–05.
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> Finally, consider the First Amendment doctrine concerning identity-based discrimination. In *Citizens United v. Federal Election Commission*, the Court confronted a federal statute which prohibited only corporations and unions from making, within 30 days of a primary or 60 days of a general election, "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office." 558 U.S. 310, 320–21, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). The Court explained the First Amendment problems posed when government "identifies certain preferred speakers" by law, writing that government may not "deprive the public of the right to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each." *Id.* at 340–41, 130 S.Ct. 876. Applying strict scrutiny and acknowledging that some identity-based restrictions may be justified when necessary to prevent interference with "certain government functions," the Court concluded that no such interest justified the statute's identity-based discrimination against corporations and unions, and accordingly held that the statute violated the First Amendment. *Id* at 341, 130 S.Ct. 876.

NLRB v. Iron Workers Local 229, 974 F.3d 1106, 1108-9, 1111-2 (9th Cir. 2019). Nor is First Amendment doctrine any less applicable in the context of a charge of an alleged violation of section 8(b) of the Act:

> After *IBEW* was decided, the Supreme Court made clear that although certain forms of labor *picketing* do not receive the full First Amendment protection that courts extend to other forms of speech, other labor speech does… *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council* ("*DeBartolo*") emphasized, as Justice Stevens had in *Safeco*, that non-picketing labor speech is more protected by the First Amendment than is labor picketing. 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). The Court observed that "picketing is qualitatively different from other modes of communication" and cited Justice Stevens's *Safeco* concurrence for the proposition that the persuasive force of labor picketing draws its strength from such picketing's conduct element rather than from the force of the ideas expressed. *Id.* at 580, 108 S.Ct. 1392 (internal quotation marks and citation omitted). Applying this distinction to the facts of the

> case—which involved union members distributing handbills "without any accompanying picketing or patrolling," *id.* at 571, 108 S.Ct. 1392—the Court concluded that because the distribution of handbills constituted "mere persuasion," involving no "intimidat[ion] by a line of picketers," construing the NLRA to prohibit secondary handbilling would raise "serious questions" about its compatibility with the First Amendment that prohibiting secondary picketing does not. *Id.* at 575–76, 580, 108 S.Ct. 1392….
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> After *DeBartolo*, First Amendment challenges to restrictions on a union's expressive activity must be evaluated under the rationale that a majority of the Court there endorsed. If the expressive activity, like handbilling, lacks the conduct element that distinguishes labor picketing, the communication falls on the speech side of the *DeBartolo* line, and a serious First Amendment problem is posed.Until now, our circuit has been faithful to the inquiry *DeBartolo* requires in such cases. In *Overstreet v. United Brotherhood of Carpenters and Joiners of America*, Local Union 1506, union members had held aloft large banners announcing a "labor dispute" and declaring "SHAME ON" certain (secondary) retailers. 409 F.3d 1199, 1201–02 (9th Cir. 2005). The union argued that its bannering activity was protected by the First Amendment, so this Court considered whether such bannering was more like the "mere persuasion" in *DeBartolo*, and therefore potentially entitled to full First Amendment protection, or more like the "intimidation by a line of picketers" in *Safeco*, and therefore unprotected. *Id.* at 1210–11 (citations omitted). Given the stationary nature of the bannering activity and the absence of any physical or symbolic barrier blocking the entrances to the retailers' establishments, this Court concluded that the handbilling in *DeBartolo* was more suitably analogous. *Id.* at 1211–16…
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> *DeBartolo* and *Overstreet* involved applications of Section 8(b)(4)(ii)(B), whereas this case concerns the application of Section 8(b)(4)(i)(B). But developments in First Amendment doctrine are not confined to the particular statutory context in which they arise. There is no principled reason why the First Amendment rationale developed by Justice Stevens in *Safeco* and subsequently incorporated by a majority of the Court in *DeBartolo* would be any less applicable to one statutory subsection than to the other.

Id. at 1113-5.

There is no justification for singling out union speech in the form of an evidence preservation letter when any other person could send the same letter.

In any case, we also note that to the extent that counsel for the charging party suggests that a Respondent must shirk from such letters because they refer to sanctions and issues that might arise outside of Board litigation, counsel shirks from his responsibility to read the

Supreme Court's Decision in *Epic Systems Corp. v. Lewis*, 584 U.S. _, 138 S.Ct. 1612 (2018). The Board has interpreted that case as to hold that filing lawsuits is not considered protected activity. See, *Commerce Club, Inc*., 369 NLRB No. 106 (2020). Thus, to the extent that the request would apply to potential litigation other than before the Board and encompasses such litigation, it is not a violation of the Act. Respondent, of course, disagrees with the Board's decision in *Commerce Club,* but that currently is the law under the current Board. It may change with a new Board, but has not done so. Given *Commerce Club* and *Epic Systems,* the fact that the evidence preservation letter was sent in case there was other litigation that went before the Board, it is fully protected by the First Amendment and not prohibited by the Act.

Additionally, we note that the Board has strictly limited theories of complaints to those advanced by the General Counsel. See, *Hobby Lobby Stores, Inc*., 267 NLRB No. 78, Note 3 (2019). The ALJ recognized this.

The Board cannot shirk from its prior decisions and must apply them to the exceptions of the charging party.

If the employee were to read the letter and not shirk his responsibility to carefully read it, he would not reasonably read it to be unlawful. See, *Medic Ambulance Service, Inc*, 370 NLRB No 65 (2021). In the context of litigation and the possibility of more litigation, the letter could not be construed to be unlawful. Here if the charging party had had any question, he was free to ask his counsel, who presumably would not shirk from providing the right advice. If he shirked his responsibility to read the letter and shirked his right to consult with his representative, it was not Respondent's fault.

BE&K Construction v NLRB, 536 U.S. 516 (2002) governs to the extent that litigation is not unlawful unless preempted. Here charging party has invoked the Board's process, but litigation would not be preempted under a duty of fair representation claim under 29 U.S.C. section 185. The First Amendment right to petition protects the right of Respondent to protect itself by asking a party to preserve evidence.

The Board should not shirk its responsibility and should deny the exceptions. It should find that the evidence preservation letter does not constitute restraint or coercion, and that the First Amendment protects the evidence preservation letter.

Respectfully submitted,

Dated: February 4, 2021

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/S/ *ANNE I. YEN*

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148061/1141512

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On February 4, 2021, I served the following documents in the manner described below:

ANSWER TO GENERAL COUNSEL AND CHARGING PARTY'S EXCEPTIONS TO ALJ DECISION

X BY ELECTRONIC SERVICE By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from larnold@unioncounsel.net to the email addresses set forth above.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 4, 2021 at Emeryville, California.

/s/ Laureen D. Arnold
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